

SUMMARY

This Opinion was originally issued by the State Bar Ethics Committee in 2005. The Arizona Attorney Ethics Advisory Committee (the “Committee”) has updated the Opinion but its conclusions remain unchanged.

This opinion reviews the ethical dilemma posed when an attorney learns that, due to a former client’s apparent perjury in a civil proceeding, the attorney has offered false material evidence to a tribunal. The Committee concludes that the Arizona Rules of Professional Conduct, under the facts of this case, provide that the attorney’s duty of candor to the tribunal overcomes the ethical duty of preserving the former client’s confidences and that the attorney must take reasonable remedial measures effective to undo the effect of the false evidence with respect to the affected tribunal.

FACTS

The inquiring Attorney, who was not identified in the original opinion due to State Bar Ethics Committee confidentiality rules, represented Client in an unemployment compensation proceeding. Client’s employer had discharged Client, accusing Client of specified wrongdoing. Denying the allegations, Client sought unemployment benefits. An examiner denied Client any unemployment benefits on the basis of dishonesty and committing a criminal offense against the employer. Client has never been charged with any criminal offense arising from the employer’s allegations. Client retained Attorney to appeal the denial of the unemployment claim. Attorney and Client participated in an appeal before a Department of Economic Security single-member “appeal tribunal.” *See generally* A.R.S. § 23-671 (describing appeal process from examiner’s decision).

The employer introduced certain evidence on appeal supporting its allegation of Client’s dishonesty. Attorney, through Client’s testimony, countered that evidence and offered additional evidence supporting Client’s case. The appeal tribunal ultimately ruled that the employer did not prove wrongdoing on Client’s part and awarded Client unemployment benefits. Subsequent to the hearing, a third party told Attorney that Client had not been truthful with Attorney or in testimony before the appeal tribunal. Attorney confronted Client about the alleged perjury, and Client admitted the perjury and other material facts to Attorney, establishing that false evidence had been presented to the tribunal. After Attorney privately remonstrated with Client about the need to correct the record, Client discharged Attorney. Attorney believes that although the employer has appealed the hearing officer’s decision, Client has found other employment and is no longer receiving unemployment compensation.

QUESTION PRESENTED

Must an attorney take reasonable remedial measures upon learning of a former client's false testimony to an unemployment compensation hearing officer, and, if so, what measures must be taken?²

RELEVANT ETHICAL RULES³

ER 1.0 Terminology

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(m) "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

ER 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d) or ER 3.3(a)(3).

ER 1.9 Duties to Former Clients

(c) A lawyer who has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

ER 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

² This opinion does not address a lawyer's option to voluntarily reveal client confidences reasonably necessary to prevent a client from committing certain crimes or frauds. *See* ER 1.6(d) (1) – (2).

³ All citations to the Ethical Rules and related Comments are to 17A Ariz. Rev. Stat. Ann., Rules of the Supreme Court, Rule 42 (West 2004).

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; [or]

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by ER 1.6.

RELEVANT ARIZONA ETHICS OPINIONS

Opinions 2002-02, 2001-14, 93-10, 92-2, 91-02, 80-27.

OPINION⁴

This opinion addresses the continuing quandary of an attorney's ethical obligations upon learning that a client has testified falsely before a civil tribunal.⁵ Under the previously used Arizona Code of Professional Responsibility, the ethical rules generally did not require or permit an attorney to reveal confidential information learned from a client even in the face of knowledge that the client committed perjury. *See generally* Ariz. Op. 80-27 (noting that under DR 7-102(B)(1) (as in effect on December 12, 1980), an attorney was not ethically required to reveal a client's fraud on a tribunal if to do so would violate the client's confidential communication to the attorney as defined by then-existing DR 4-101).

⁴ This opinion does not address whether an attorney has any legal duty to protect confidential client communications. *See* A.R.S. § 12-2234 (establishing attorney-client privilege in civil proceedings); A.R.S. § 13-4062(2) (establishing attorney-client privilege in criminal proceedings). Opinions on the law are beyond the Committee's jurisdiction.

⁵ This opinion does not concern an attorney's ethical duties upon learning of a client's false testimony made during the course of a criminal proceeding. Criminal proceedings present legal and constitutional issues not applicable in civil matters. *See generally* *Nix v. Whiteside*, 475 U.S. 157 (1986); ER 3.3 cmt. [7] ((citing *State v. Jefferson*, 126 Ariz. 341 (1980), and *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978), and recognizing that some courts have held that the duties imposed by ER 3.3 "is subordinate" to constitutional considerations present in criminal proceedings)); Geoffrey C. Hazard & W. William Hodes, Jr., 2 *The Law of Lawyering* §§ 29-15 – 29-20 (3d ed., Aspen 2004) (discussing client perjury in context of criminal case representation); Ariz. Op. 2002-02, at 6-8 (same).

Under the present Arizona Rules of Professional Conduct, however, the balance has shifted away from preserving client confidences and towards the attorney's duty of candor to the tribunal. ER 3.3(c) explicitly requires the disclosure of a client's false testimony notwithstanding that the attorney "knows" of the false testimony via a client's confidential communication. The Rules make the policy determination that insuring the integrity of the decision-making process trumps, in some instances, a lawyer's traditional duty to protect a client's confidences. Ariz. Op. 93-10, at 3-4 (recognizing that the "tension" between an attorney's duty to a client and to the court has been resolved in favor of the court in the context of a client giving false evidence); Geoffrey C. Hazard & William Hodes, Jr., 2 *The Law of Lawyering* §§ 29-14, at p. 29-25 (3d ed., Aspen 2004) [hereinafter, Hazard, *The Law of Lawyering*].

Ethical Duty Under ER 3.3

ER 3.3(a)(3) plainly requires an attorney to refrain from knowingly offering false evidence. Further, when an attorney later learns that he or she has offered false material evidence to a tribunal, including evidence offered directly by a client or former client,⁶ the attorney must take "reasonable remedial measures, including if necessary, disclosure to the tribunal." ER 3.3(a)(3); see also Hazard, *The Law of Lawyering*, § 29.23 (discussing analogous section of the Restatement (Third) of the Law Governing Lawyers (2000) which provides that duty of candor to the tribunal survives termination of the attorney-client relationship). The duty to take remedial measures lasts until "the conclusion of the proceeding." ER 3.3 cmt. [13]. A proceeding is deemed concluded when the result of the proceeding has been upheld on appeal or the time for the appeal has otherwise expired. *Id.* In this case, then, the Committee must examine (1) whether Attorney "knows" that false evidence was presented, (2) whether the purportedly false evidence was offered to a "tribunal," (3) whether the evidence was "material," (4) what "reasonable remedial measures" are necessary under the circumstances, and (5) the duration of Attorney's obligation to take such measures.⁷

1) Attorney's Knowledge

Attorney here first received an indication of Client's false testimony from a third party. Attorney then privately confronted Client about the third party's allegations, and Client admitted the perjury in addition to other material facts. To Attorney, these admissions conclusively established the falsity of Client's prior testimony. Thus, here there is no dispute that Attorney now "knows" that Attorney unwittingly offered Client's false testimony. See ER 1.0(f) (stating that "actual knowledge of the fact in question" satisfies ER's knowledge requirement); Ariz. Op. 93-10, at 4 (stating that attorney's "knowledge" of client's false testimony is "ordinarily based on the client's own admissions to the attorney"). Cf. Hazard, *The Law of Lawyering*, § 29.21 (emphasizing that "knowing" of a client's false testimony means more than a mere "suggestion" or suspicion that the client has committed perjury).

⁶ An attorney owes similar ethical duties of confidentiality to former clients as to existing clients. ER 1.9(c).

⁷ Because each of the five elements must be present to trigger the duty under ER 3.3(a)(3), each element is potentially a "threshold" element, i.e., an element which if not present renders it unnecessary to determine the existence of the remaining elements. Because the Committee seeks to provide guidance to members on all the elements, the Committee chooses to discuss all of them notwithstanding that in this case Attorney's duty may have lapsed due to the "conclusion" of the proceedings." See Parts 5a and 5b, *infra*.

2) Definition of Tribunal

The duty found in ER 3.3 applies to all “tribunals,” not just courts of law. ER 1.0(m) defines tribunal in broad terms. It includes any administrative agency acting in an adjudicative capacity involving a neutral decision-maker who receives evidence and/or legal argument from opposing parties and is then to render a legally binding judgment affecting the parties’ interests. The appeal hearing process described earlier fits this definition of a “tribunal.” *See* A.R.S. § 23-671 (describing “appeal tribunal” process including requirements that tribunal be impartial, conduct a fair hearing at which “all interested parties” have an opportunity to be present and heard, and to render a decision); *see also* Hazard, *The Law of Lawyering* at § 29-3, p. 29-6 (discussing intended breadth of “tribunal”). *Cf.* Ill. Ethics Op. 99-04 (finding that a hearing before an Administrative Law Judge of the Social Security Administration was a “tribunal” under Illinois version of ER 3.3).

3) Material Evidence

It seems equally clear that the false testimony in this case was “material evidence.” Without recounting so much of the facts that it would in all likelihood identify Attorney and Client, Client made specific false denials under oath to directly refute the employer’s evidence. Attorney unwittingly used this false testimony to discredit the employer’s proof of Client’s dishonest behavior. Although the Committee cannot know with certainty that this evidence swayed the appeal tribunal’s decision, it must have been considered “material” to it because the false evidence went directly to points in dispute and was relevant to the proceedings and decision. *See* Ariz. Op. 93-10, at 4 (deeming client’s inconsistent and irreconcilable testimony in two separate proceedings material evidence).

4a) Reasonable Remedial Measures – Generally

Given Attorney’s actual knowledge of having unwittingly offered false material evidence resulting from Client’s deception, Attorney now has an ethical duty under ER 3.3(a)(3) to take “reasonable remedial measures.” The Committee stresses, however, that disclosures made pursuant to ER 3.3 should be narrowly tailored and no broader than necessary to undo the effect of the tainted evidence. *See* ER 3.3 cmt. [10] (stating that purpose of reasonable remedial measures is to “undo the effect of the false evidence”). *Cf.* ER 1.6(b).

Normally, the first remedial measure should be to confidentially approach and attempt to persuade the client that the client should cooperate in seeking to withdraw the false evidence. Such private remonstrance should also include the advice that the attorney is ethically bound to take remedial measures, including, if necessary, disclosure to the tribunal of the false evidence. If the client agrees to seek withdrawal of the false evidence, the attorney should proceed accordingly by moving to withdraw the tainted evidence from the record but without disclosing the fact of the client’s misconduct.⁸ In most circumstances this should be a sufficient reasonable remedial measure, if the timing of the withdrawal allows the tribunal to react to the change in

⁸ The Committee envisions in most cases such a motion being made to the tribunal with notice to all appropriate parties. This opinion does not condone inappropriate *ex parte* communications with a tribunal. *See* ER 3.5(b) (prohibiting unauthorized *ex parte* communications).

evidence (e.g., the proceeding is still pending). If pressed for a reason why the evidence is being withdrawn, the attorney should cite client confidentiality, attorney-client privilege, and, if appropriate, the client's Fifth Amendment right against self-incrimination. *See* ABA Formal Op. 98-412, at 2 & n.5 (recommending as one course of action the attorney's withdrawal of the false evidence and reliance on the cited privileges).

Even if the client does not agree to the withdrawal of the evidence, the next reasonable measure generally would be for the attorney to move to withdraw the evidence from the tribunal's consideration without the client's consent. If an attorney can refuse to offer evidence the attorney reasonably believes to be false,⁹ *see* ER 3.3(a)(3), there seems to be no good reason why the attorney could not move to withdraw evidence from a tribunal's consideration that he or she knows to be false. This measure, too, should be done without revealing any client misconduct. The attorney should cite client confidentiality, attorney-client privilege, and the client's Fifth Amendment privilege, if appropriate, should the tribunal insist upon an explanation why the attorney is seeking withdrawal of the evidence. Again, whether this might be a sufficient remedial measure depends on whether the tribunal could effectively react if it grants the motion to withdraw the evidence.¹⁰

In cases unlike this one, where the false evidence has not been offered, but the client so intends and cannot be dissuaded from that course, another possible reasonable remedial measure might be seeking to withdraw from the representation of the client. *See generally* ER 1.16(b) (listing grounds for termination of the representation). Arguably, however, in some circumstances mere withdrawal from the representation may be insufficient under the present version of the Rule.¹¹

When an attorney withdraws from the representation (or, as here, is discharged), the attorney may reasonably conclude that the termination of the representation will not undo the effect of the tainted evidence and so further remedial measures might be necessary. In that circumstance, the attorney should advise the client that retention of successor counsel would be in the client's best interests because the withdrawing (or discharged) attorney has a duty to take reasonable remedial measures including possibly informing the tribunal of the false evidence.¹²

⁹ This right to refuse to offer such evidence does not extend to the testimony of a criminal defendant. *See* ER 3.3(a)(3).

¹⁰ Whether the lawyer's withdrawal of evidence without the client's consent creates a conflict of interest under ER 1.7(a)(2) is something the lawyer placed in that situation must determine on a case by case basis. *See* ER 1.16(b) (describing when an attorney may terminate a representation).

¹¹ The Committee recognizes that an argument could be made that even if an attorney had forewarning of a client's intent to perpetrate a fraud on a tribunal, mere withdrawal may be insufficient. ER 3.3(b) requires an attorney to "take reasonable remedial measures" when the attorney "knows that a person intends to engage" in "criminal or fraudulent conduct related to the proceeding." Under a prior version of the rule, a simple withdrawal would have been sufficient because the rule only forbade an attorney from "assisting a criminal or fraudulent act by the client." ER 3.3(a)(2) (1998). Thus, mere withdrawal was sufficient under that Rule because the attorney was no longer "assisting" the client. *See* ABA Formal Op. 98-412. Under present ER 3.3(b), however, an attorney is no longer simply required to "avoid assisting" the client but appears to have an affirmative duty to warn the court of the impending fraud if mere withdrawal would not deter the client. Because Attorney has already been discharged in this case, however, this opinion need not address this issue.

¹² In cases involving the termination of the representation and notwithstanding that an attorney may have concluded that further reasonable remedial measures are necessary under ER 3.3(a)(3), the attorney nonetheless owes the

If neither withdrawal of the evidence nor termination of the representation would effectively remediate the fraud, the attorney should consider disclosing the client's misconduct to the tribunal. This drastic step should be taken only after all other reasonable measures have first been tried and failed or carefully considered and rejected. The Committee believes that in most instances an attorney's motion to withdraw evidence should be sufficient to remediate the fraud because such a motion is reasonably calculated to sufficiently warn the tribunal of the situation concerning the unreliability of the false evidence and "the tribunal would no longer be powerless to defend itself against" it. Hazard, *The Law of Lawyering*, § 29-21, p. 29-35. Disclosure of the client's misconduct (as opposed to putting the tribunal on notice that certain evidence should not be considered as part of the record) would seem to be rarely, if at all, necessary to undo "the effect of the false evidence," the goal behind requiring remedial measures.

Thus, and unless the ethical obligation under ER 3.3 has run its time limit, an attorney is ethically obligated to "make such disclosure to the tribunal as is reasonably necessary to remedy the situation" even if to do so would otherwise contravene ER 1.6. ER 3.3 cmt. [10]. Further, the fact that a client may ultimately face a prosecution for perjury is not a reason for an attorney to withhold disclosure. *See* ER 3.3 cmt. [11]; *see also* Ariz. Op. 93-10, at 4 (stating that if a lawyer has "knowledge" of a client's perjury in a proceeding in which the lawyer represented the client, then ER 3.3 requires disclosure to the tribunal if intermediate remedial measures prove ineffective).

4b) Reasonable Remedial Measures In This Case

Assuming Attorney's duty under ER 3.3 has not terminated because the proceedings have concluded (*see 5b infra*), Attorney has some reasonable remedial measures still available. As noted earlier, Attorney has already privately remonstrated Client. This effort was unsuccessful. Despite Attorney's appropriate efforts to convince Client to take proper remedial measures, Client rejected that advice and discharged Attorney. The fact of that discharge limits the remaining available remedial measures.

First, because Attorney is no longer counsel of record, Attorney cannot move the tribunal to withdraw the tainted evidence from the proceedings even without Client's consent. Second, Attorney can no longer move to withdraw from the representation. Even if withdrawal of the representation were possible in this case, however, it would not be a "reasonable remedial measure" because Attorney's withdrawal by itself would not cure the fraud by undoing the effect of the tainted evidence.

In these circumstances, the Committee believes Attorney should consider as an option enlisting the aid of Client's present legal counsel, if any. *See* Restatement (Third) of the Law Governing Lawyers § 120, cmt. h (2000) ("If a lawyer is discharged by a client or withdraws . . . the lawyer's obligations [of candor to the tribunal] under this Section are not thereby terminated. In such an instance, a reasonable remedial measure may consist of disclosing the matter to successor counsel."). Although this would not relieve Attorney of Attorney's own ethical obligations to the tribunal under ER 3.3, the combined efforts of former and successor counsel in private remonstrance with Client may persuade Client to consent to seek withdrawal of the false

former client ethical duties under ER 1.9 and ER 4.3 (if no successor counsel is retained) to the extent those duties are not superseded by ER 3.3(a)(3).

evidence. In addition, because Attorney is no longer Client's counsel of record, only successor counsel of record, if any, can move to withdraw the tainted evidence without Client's consent. Should this step succeed either because the Client ultimately relents and allows any successor counsel to move to withdraw the false evidence or because any successor counsel so moves even without Client's consent, Attorney would have taken a reasonable remedial measure sufficient to undo the effect of the tainted evidence and, thus, satisfied Attorney's personal obligations under ER 3.3(a)(3) notwithstanding that Attorney did not personally inform the tribunal.¹³

If there is no successor counsel of record, Attorney's only apparent option is to inform the tribunal by letter (with a copy to Client) that specific evidence is unreliable.¹⁴ Again, such a step should normally not include an express revelation of Client's misconduct. The Committee is of the opinion that in this case such a communication would be an effective remedial measure while not disclosing more than what is necessary to undo the effect of the false evidence.¹⁵

This case also presents the related question of the proper "tribunal" Attorney should notify. The Committee believes that the proper entity is that entity which has jurisdiction of the proceeding at the time the disclosure is made. Thus, Attorney must determine, by examining the appropriate statutes, rules, and case law, whether the original examiner, hearing officer, or any subsequent entity is the appropriate "tribunal" to which to make any disclosures.

5a) Duration of Ethical Obligation – Generally

ER 3.3(c) makes clear that the ethical obligation to take reasonable remedial measures survives the end of the attorney-client relationship. The ethical obligation terminates only when the tainted proceedings have concluded. If the time for appeal or other review has not yet expired and there has not yet been a final decision on the matter, then the ethical obligation to inform the tribunal exists. ER 3.3(c) & cmt. [13]. Otherwise, the duty to take remedial measures no longer exists because the proceedings would be deemed to have concluded.

5b) Duration Of Ethical Obligation In This Case

In this particular instance, Attorney must learn whether the proceedings have reached their "conclusion." Whether proceedings have concluded is ultimately a legal question. Certainly, if the original appeal of the tribunal decision to award compensation is still under active review, either by the Unemployment Insurance Appeals Board or the judiciary, the proceeding is not concluded and Attorney's ethical obligation to take reasonable remedial measures continues.

¹³ The facts of any given case may lead to the reasonable conclusion that not involving successor counsel and, instead, informing the tribunal directly would be the remedial measure that undoes the effect of the tainted evidence while doing the least harm to a former client. Thus, attorneys who have terminated, or been discharged from, a representation should consider whether contacting any successor counsel or directly informing the relevant tribunal best fulfills the ethical obligations under ER 3.3 while doing the least damage to the former client's case.

¹⁴ Whether the tribunal chooses to inform the opposing counsel and party remains a decision for the tribunal and subject to any legal and ethical requirements operating on the tribunal.

¹⁵ There is no talismanic language for the contents of such a letter. So long as the letter is reasonably calculated to put the tribunal on notice that certain evidence is unreliable and that Attorney would not have offered the evidence if Attorney had known of certain facts at the time Attorney introduced the evidence, the Committee believes that Attorney's ethical obligations are satisfied.

If that decision is no longer under review, but Client is still receiving benefits which can be modified at any time, then the proceeding may not be concluded, and Attorney's ethical obligation may continue. *See* Kan. Op. 98-01 (requiring a lawyer to take remedial measures where the lawyer learned of a client's false testimony made in a workmen's compensation proceeding and the client was still receiving benefits which could be modified at any time).

If however, as Attorney believes, Client is no longer receiving unemployment compensation and the unemployment case is now closed, Attorney's ethical duties have terminated regardless of whether the proceeding could be re-opened at any future time or a new and separate proceeding could be instituted against Client for the recovery of previously paid compensation. Otherwise, there would never be a conclusion to these types of administrative proceedings, and the Committee believes that such an open-ended ethical obligation would be inconsistent with the "practical time limit" intended by ER 3.3(c). *See* ER 3.3 cmt. [13].

Accordingly, Attorney should ascertain the present procedural posture of Client's award and then consult applicable statutes, rules, and case law to determine if the proceeding is concluded. *See generally Casillas v. Arizona Dep't of Econ. Security*, 739 P.2d 800, 802 (Ariz. Ct. App. 1986) (discussing the finality of DES decisions); *Rogers v. Arizona Dep't of Econ. Security*, 644 P.2d 292, 293 (Ariz. Ct. App. 1982) (same).

CONCLUSION

Unless the proceedings are deemed concluded (e.g., an appeal ended or the time to take an appeal has expired), an attorney in a civil proceeding must take reasonable remedial measures upon learning that he or she has unwittingly offered false material evidence due to a client's deception. The duty to take such measures applies only when the attorney has actual knowledge of the false evidence and the evidence is material. Reasonable remedial measures are to be taken in steps and should be no broader than necessary to undo the effect of the tainted evidence. The first step should normally be a private consultation with the client explaining the need to withdraw the tainted evidence and advising that the attorney has a duty to take remedial steps even if the client refuses.

Failing that attempt at counseling, the attorney's second step should be to seek withdrawal of the evidence from the tribunal's consideration without the client's consent. The attorney can cite ethical obligations as the reason for seeking withdrawal of the evidence, but should normally not inform the tribunal of the client's misconduct (e.g., that the client committed perjury), if such a withdrawal of the evidence would undo the effect of the false evidence. In that circumstance, an attorney must also consider whether he or she has a conflict of interest with the client necessitating an attempt to withdraw from the representation.

As a last step and only if no other steps would undo the effect of the false evidence, an attorney must make an explicit disclosure of the client's misconduct to the tribunal. In addition, if an attorney has terminated, or been discharged from, a representation and the former client has retained successor counsel, the former attorney should consider whether involving successor counsel would be part of an appropriate remedial measure.